U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 04 May 2005

***In the Matter of*:**

OSCAR R. PHILLIPS,
Claimant,

v.

CASE NO: 2001 BLA 1210

B & W COAL, INCORPORATED,
Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

***Appearances*:**

James Moore, Esq.
For the Claimant

Joseph W. Bowman, Esq.
For the Employer

Theresa Ball, Esq.
For the Director, *OWCP*

Before: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

Statement of the Case

This proceeding involves a claim for benefits filed under the Black Lung Benefits Act, as amended, 30 U.S.C. § 901 *et seq.* ("Act"), and the regulations promulgated thereunder.[1] Since

[1] All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's

Claimant filed this application for benefits after March 31, 1980, Part 718 applies. This claim is governed by the law of the United States Court of Appeals for the Sixth Circuit, since Claimant was last employed in the coal industry in the State of Tennessee. *See Kopp v. Director*, *OWCP*, 877 F.2d 307, 12 B.L.R. 2-299 (4th Cir. 1989); *Shupe v. Director*, *OWCP*, 12 B.L.R. 1-200 (1989) (*en banc*).

Oscar R. Phillips (the "Claimant") filed his first claim for benefits under the Act with the Social Security Administration (SSA) on October 12, 1970. (D-28). This initial "Part B" claim was administratively denied by the Social Security Administration on March 16, 1971, and after additional review on July 13, 1973 and July 6, 1974. (D-28:24, -33). Claimant filed an election card requesting further review by the SSA under the Black Lung Benefits Reform Act, which again denied the claim. The claim was also denied by the Department of Labor (DOL) on October 14, 1980 after the claim was transferred to that agency for automatic review under the 1977 Reform Act. (D-28:34-38), and that denial became final.

Claimant filed a second, duplicate, claim for benefits on August 3, 1995. (D-29). This claim was denied by the District Director on January 30, 1996. (D-29:19). The District Director found that Claimant failed to establish any element of entitlement. (D-29:19). The claim was not appealed and became final.

Claimant filed the instant duplicate claim on February 3, 1999, which has been processed under the preamendment regulations. (Part 718 (2000); D-1). On June 8, 1999, the District Director denied this claim, finding that Claimant failed to establish any element of entitlement. (D-14).

Difficulties in identifying the responsible operator, have caused delays. On February 20, 2001, the District Director issued a *Proposed Decision and Order Special Determination on Identity of Responsible Operator* setting forth the applicable regulations, and a summary of evidence and findings pertaining to the identity of putative responsible operators, and verification of whether these entities are still viable or able to discharge their obligation to pay benefits under the Act. (D-24).

The District Director then entered the following *Findings of Fact and Proposed Order*:

1. If it is ultimately found that either Laurel Fork Mining Company Inc., its officers or a successor operator is financially capable of assuming such liability they will be liable for the payment of any benefits to which Claimant may be found entitled.

2. In the event neither Laurel Fork Mining Company, Inc., its officers nor a successor operator can be found to be financially capable of assuming liability in this case, such liability will fall to the Tennessee Insurance Guaranty Association on behalf of Rockwood Insurance Company who

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exhibits are denoted "D-"; Claimant's exhibits, "C-"; Employer's exhibits, "E-"; and citations to the transcript of the hearing, "Tr."

insured both B & D Coal Company, Inc. and A & L Coal Company, Inc.

3. In the event, the motion filed by the U.S. Department of Labor's Office of the Solicitor, requesting an exclusion from the bar date imposed by the bankruptcy court is denied, liability will fall to Old Republic Insurance Company. This company insured B & W Coal Inc. and Gay Coal Inc.

(D-24). On May 11, 2001, the District Director issued a *Decision and Order* discharging B&D Coal Company and A&L Coal Company as potential responsible operators. (D- 24). On June 5, 2001, the District Director issued an *Order to Show Cause*, directed at Claimant, because Claimant purportedly failed to cooperate with employers' request for discovery. (D-26). There is no indication in this record of any action taken pursuant to this Order. Counsel for the employer represented that Claimant's attorney had responded to the Order.[2] (Tr. 10-12).

On September 10, 2001, the claim was referred to the Office of Administrative Law Judges for a formal hearing. (D-30). This hearing was conducted before the undersigned in Knoxville, Tennessee, on April 13, 2004. Director's Exhibits 1-30 (D-1-30), and Employer's Exhibits 1-23 (E 1-23) were admitted into evidence. (Tr. 6, 47). Employer was granted leave to submit the post-hearing deposition of Dr. Hippensteel, which was filed on May 11, 2004, and admitted into evidence as Employer's Exhibit 24.

Issues

1. Whether Claimant has proved the existence of pneumoconiosis.
2. If so, whether Claimant's pneumoconiosis arose out of his coal mine employment.
3. Whether Claimant suffers from total respiratory disability.
4. Whether such total respiratory disability is due to pneumoconiosis.
5. Whether Claimant has proved a material change in conditions under the Act and applicable regulations.
6. Whether B&W Coal Company/Gay Coal Company are or may be held liable for benefits as responsible operators.

Counsel for the employer withdrew as issues the timeliness of the claim, and the issues of whether Claimant was a miner, and served in that capacity after 1969. (Tr. 7). Claimant is credited with 35 years coal mine employment,, based on his testimony and the Social Security earnings records.

[2] The potential responsible operators, B & W and Gay, are separate and distinct, but share the same insurance carrier, Old Republic. They will be referred to collectively as "employer." (Tr. 9-10).

Findings of Fact

Background and Dependents

Claimant, Oscar R. Phillips, was born on July 2, 1936, and was 67 years old at the time of the formal hearing. (Tr. 23). He is currently divorced. (D-1; Tr. 42). He has a second grade education. (Tr. 37). He testified that he started working in the mines in 1956 for Lane Coal Company. (Tr. 23). He worked a total of 35 years with a variety of coal mines, with most of this work in underground mining. (Tr. 24). Most of his work entailed production tasks, coal transportation, working at the face and working around equipment such as a continuous miner and the belt line. (Tr. 24-25). All of this work was in dusty conditions, and involved "medium light" jobs. (Tr. 26). Much of this work was more strenuous, shoveling coal that fell from the belt and spreading rock dust. At times he would be required to shovel coal or dust in shovelfuls weighing 20 pounds. (Tr. 27).

Claimant last worked with Laurel Fork Mining from sometime in 1981 until January 19, 1995. His breathing interfered with this work, because shortness of breath curtailed his ability to walk the long distances required of his work, and to continue to shovel. He emphasized that his breathing has deteriorated since 1995. (Tr. 31-35). He described his symptoms as shortness of breath, trembling and heart fluttering. These symptoms persist to this day. He is limited in climbing stairs, and in operating a riding mower. (Tr. 36, 39-40). His medications for breathing have included inhalers and cough syrup. (Tr. 38).

Claimant smoked from the last part of the 1950's to the early '60's, but has not smoked since. He has suffered a heart attack, and had coronary artery bypass surgery in 1998. (Tr. 43). Although his breathing bothered him in 1995, and was a factor in his leaving the mines, Claimant was laid off that year. (Tr. 43). He also had suffered a back injury in 1967, necessitating surgery.

Medical Reports and Opinions

The following medical reports were developed subsequent to the denial of Claimant's previous claim.[3]

Dr. Richard E. Parrish

Dr. Parrish examined Claimant on May 10, 1999, pursuant to the obligation of DOL to provide Claimant with a complete pulmonary evaluation. Dr. Parrish conducted a physical examination, recorded a patient history, and administered clinical tests, as reflected on the standard DOL form for the purpose. (Ds-8, 9, 10). Dr. Parrish noted Claimant's coal mine history, and reported a patient history that included attacks of wheezing over six and seven years duration. He also recorded that Claimant has suffered from arthritis, heart problems, and a back

[3] Claimant submitted the medical opinion by Dr. Baker, dated July 7, 1995. (D-7; *see also* D-29:18). Because this report was available prior to the denial of Claimant' previous claim by the District Director, it is not new evidence in this duplicate claim.

injury. Current medical complaints included wheezing attacks, dyspnea when getting dressed, chest pain, orthopnea, ankle edema and paroxysmal nocturnal dyspnea, which awakens him. On physical examination, Dr. Parrish found no abnormalities on examination of the chest or in the extremities.

Dr. Parrish diagnosed coal workers' pneumoconiosis, industrial bronchitis and bronchospasm. He attributed Claimant's cardiopulmonary diagnosis to "Coal Dust Exposure." In assessing impairment, Dr. Parrish concluded that Claimant "has reversible airways disease requiring chronic medication for bronchodilation," but he did not in the space provided assess the extent to which any of his diagnoses contributed to the impairment. He also recorded a non-cardiopulmonary diagnosis of coronary artery disease with a history of coronary artery bypass surgery ("S/P CABG").

Dr. Kirk E. Hippensteel

Dr. Hippensteel submitted a review of Claimant's medical records submitted in conjunction with all of Claimant's filings in a report dated February 6, 2002. (E-1). Dr. Hippensteel opined, "I think it can be stated with a reasonable degree of medical certainty that this man does not have coal workers' pneumoconiosis based upon the evidence as a whole." Dr. Hippensteel noted that positive chest x-rays had been reread as negative, abnormalities in earlier pulmonary function testing had "corrected to normal on later testing, showing that [Claimant] had no permanent impairment in ventilatory function from any cause, including pneumoconiosis." Dr. Hippensteel summarized:

> The findings in these records show with a reasonable degree of medical certainty that this man has neither medical or legal coal workers' pneumoconiosis. This man has not suffered any objective pulmonary impairment caused by, contributed to, or aggravated by his prior coal mine dust exposure, and that he has the pulmonary capacity on his most recent testing, to return to his previous job in the mines. ...

(E-1). Dr. Hippensteel is board-certified in internal medicine, with a subspecialty in pulmonary disease. He is also a B-reader, and has been Clinical Assistant Professor of Medicine, University of Virginia School of Medicine, since July 1988. (E-2).

On April 23, 2004, Dr. Hippensteel testified on deposition about this report. (E-24). He noted that Claimant' history of 36 years in the mines, five years of smoking, and a history of allergies, were risk factors in the development of any pulmonary impairment. (E-24 at 9-10). Dr. Hippensteel noted that attacks of wheezing, recurrent bronchitis spells, and the need for antibiotics and steroids were not specific for a coal mine dust related disease. (E-24 at 11). He emphasized that shortness of breath is nonspecific, and can occur in the absence of any lung disease.

Dr. Hippensteel responded to questions about what appeared in Claimant's medical records to be intermittent episodes of wheezing because that symptom appeared on some examinations but not on others. (*Id*. at 13). With regard to the pulmonary function test

conducted by Dr. Parrish in May, 1999, he opined:

> ... In that circumstance, it showed that he had a normal vital capacity, which means that he does not have any restrictive disease, and that he had a normal FEV-1, showing that he had no obstructive impairment, either, and, in addition, he had a diffusion which was in the lower range of normal at 80 percent predicted, showing that his diffusion capacity was okay, and he also had lung volumes that showed no more than mild air trapping as an abnormality on these tests.

(E-24 at 16). Dr. Hippensteel also opined that the normal diffusion capacity indicated no impairment in gas exchange that would be derived from a disease like coal workers' pneumoconiosis. (*Id.* at 20). , Dr. Hippensteel concluded that the arterial blood gas test results showed normal oxygenation, and that Claimant's "lungs are doing a normal job of getting oxygen into his bloodstream[.]" (*Id.* at 21-22).

Dr. Hippensteel concluded:

> I thought that he had no evidence of pulmonary dysfunction from any cause, including his prior coal mine dust exposure ... I meant that he did not have any permanent effect on function, and certainly, in looking at a chronic disease like coal workers' pneumoconiosis, one would expect any effect from that to be permanent, unless one had a temporary industrial bronchitis as a cause for that, so that I thought that this, in addition to the other evidence in the x-ray interpretations, the exam findings, the arterial blood gas testing, all fit in with the finding that this man had not developed coal workers' pneumoconiosis as a result of his exposure to coal mine dust.

(E-24 at 24-25). Dr. Hippensteel also opined that Claimant did not suffer from any impairment. He noted that a pulmonary function study that had been conducted in 1971 showed some adverse functional change, but that the test results reversed themselves in 1999 with Dr. Parrish's testing. He emphasized that Claimant suffered from no permanent lung condition that would cause functional disability, and that his intermittent symptoms were not related to coal mine dust exposure. (*Id.* at 26). He declared that, contrary to Dr. Parrish's findings, Claimant did not have industrial bronchitis, a disease that Dr. Hippensteel said would dissipate within a period of several months after leaving work. He finally concluded that, based on the most recent pulmonary function study in 1999, Claimant would have the pulmonary capacity to return to the mines. (*Id*. at 27). On cross-examination, Dr. Hippensteel testified that Claimant's smoking was a minimal risk, and he emphasized that Claimant' symptoms were non-specific, and do not point to a specific etiology.

Treatment Notes

The record contains notes from treatment and office visits to various physicians over the years. (D-23). For purposes of the instant duplicate claim, only those notes that reflect treatment after the denial of the previous claim are set forth. An entry for January 15, 1997, noted that

Claimant complained of coughing up yellow and black sputum. A physical examination of the lungs showed expiratory wheezes. There were no rhonchi or rales. There were also complaints of wheezing and breathing problems noted on July 22, 1997. The notes for this date reflect diagnoses of coal workers' pneumoconiosis and COPD. On November 24, 1997, there are notations of shortness of breath for 2-3 days, "polyphonic wheezes" but no crackles. It was felt that Claimant suffered an "exacerbation of COPD." On December 12, 1997, there is an entry of "Acute bronchitis."

Notes from May 8, 1998, reflect concerns of chest pain and a cardiac referral. Claimant underwent a four-vessel coronary artery bypass procedure in May, 1998. In a letter, dated June 28, 1998, Dr. Thomas R. Pollard, a cardiologist, wrote Dr. Gregory Gibson to report that Claimant' "postoperative course has been essentially uncomplicated." Dr. Pollard observed that "[Claimant] has been fairly active around his house and has not had any problems with chest pain or shortness of breath." Claimant's lungs were clear on physical examination. On July 28, 1998, Dr. Pollard noted, *inter alia*, "mild short wheezes over the lung fields bilaterally."

Entries from November 2, 1998, show negative results for edema and shortness of breath. A similar entry on March 26, 1999 also show no complaints about shortness of breath, chest pain or edema. An entry on November 20, 2000, indicates "prolonged expiration" on examination of the chest.

The employer submitted a "procedure note," dated May 28, 1998, from Dr. Mukesh Sharma describing a cardiac catheterization procedure conducted on that date. (E-13).

X-Ray Evidence[4]

The following x-ray interpretations have been submitted for this duplicate claim:

Exh. No.	X-ray Date Reading Date	Physician	Qualifications	Film Quality	Interpretation
E-7	1-20-97 7-02-02	Spitz	B/BCR	1	no pneumoconiosis
E-8	2-12-97 7-02-02	Spitz	B/BCR	1	no pneumoconiosis
E-9	6-16-97 7-02-02	Spitz	B/BCR	1	no pneumoconiosis
E-10	12-18-97 7-02-02	Spitz	B/BCR	1	no pneumoconiosis

[4] The following abbreviations are used in describing the qualifications of the physicians: B-reader, "B"; board-certified radiologist, "BCR". An interpretation of "0/0" signifies that the film was read completely negative for pneumoconiosis.

Exh. No.	X-ray Date Reading Date	Physician	Qualifications	Film Quality	Interpretation
E-11	3-30-98 7-02-02	Spitz	B/BCR	1	no pneumoconiosis
E-12	12-01-98 7-02-02	Spitz	B/BCR	1	no pneumoconiosis
D-11	5-10-99	Parrish			1/1
D-11	5-10-99	Hughes		1	1/1
D-12	5-10-99 6-03-99	Sargent	B/BCR	3	no pneumoconiosis
D-27	5-10-99 5-14-01	Wheeler	B/BCR	2	no pneumoconiosis
D-27	5-10-99 5-14-01	Scott	B/BCR	3	no pneumoconiosis

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. These tests are also acceptable documentation for a medical opinion diagnosis of pneumoconiosis. The greater the resistance to the flow of air, the more severe the lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The quality standards for pulmonary function studies performed before January 19, 2001, are found at § 718.103 (2000).

The following pulmonary function studies were developed for this duplicate claim[5]:

Ex. No. Date Physician	Age Height	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify	Impression cooperation comprehension tracings
D-8 5-10-99 Parrish	62 66"	2.89	4.15		104	No	"good" coop/comp tracings attached
E-14 2-12-97 Parrish	60 67"	2.88	3.75			No	tracings attached
E-15 4-15-97 Parrish	60 68"	3.00	3.79			No	Tracings attached
E-16 12-18-97 Parrish	61 67"	2.68	4.13			No	Tracings attached
E-17 3-30-98 Parrish	61 67"	3.12	4.11			No	Tracings attached

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The quality standards for arterial blood gas studies performed before January 19, 2001, are found at § 718.105 (2000). A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. § 718.105(b) (2000).

The following arterial blood gas study evidence was developed for this subsequent claim:

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[5] "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. § 718.204(b)(2)(i) (2003). Claimant's height has been measured at values between 66 and 68 inches. His height for purposes of evaluating the pulmonary function study results is determined to be 67 inches. *See Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116, 19 B.L.R. 2-70 (4th Cir. 1995).

Exhibit Number	Date Altitude	Physician	pCO_2 at rest/ exercise	pO_2 at rest/ exercise	Qualify
D-10	5-10-99 <2999'	Parrish	37.5 31.7	80.5 89.1	No
E-18	10-08-98	Parrish	37.4	86	No

Conclusions of Law and Discussion

Complete Pulmonary Evaluation

The Director has fulfilled the Department's statutory obligation to provide the Claimant with a complete pulmonary evaluation pursuant to Section 413(b) of the Act. 30 U.S.C. §923(b), as implemented by §§ 718.102, 725.405 and 725.406. The Department of Labor would not have satisfied this obligation if the physician who performed the pulmonary evaluation at the request of the Department has not addressed a necessary element of entitlement. *See Cline v. Director*, *OWCP*, 972 F.2d 234, 14 B.L.R. 2-102 (8th Cir. 1992); *Collins v. Director*, *OWCP*, 932 F.2d 1191, 15 B.L.R. 2-108 (7th Cir. 1991); *Newman v. Director*, *OWCP*, 745 F.2d 1161, 1166 (8th Cir. 1984). *See Hodges v. BethEnergy Mines Corp.*, 18 B.L.R. 1-84 (1994). This obligation obtains for duplicate and subsequent claims. *Hall v. Director*, *OWCP*, 14 B.L.R. 1-51 (1990).

In his medical report and opinion Dr. Parrish affirmatively diagnosed pneumoconiosis based on x-ray and exposure history. (D-9). He did not render an explicit assessment of respiratory disability, but concluded that Claimant suffers from a reversible airways disease requiring chronic medication. His reference to "Coal Dust Exposure" establishes a nexus with coal mine employment. (D-9). By implication, because of his generally normal findings and the absence of qualifying clinical tests, he did not find Claimant to be totally disabled by pulmonary impairment from returning to his usual coal mine work, though there is a suggestion of coronary artery disease as disabling. He did not assess any loss in lung function. Thus he addressed all elements of entitlement essential to a pulmonary evaluation under the Act.

Duplicate Claim

Because Claimant filed the instant claim on February 3, 1999, more than one year after the final denial of his previous claim, this constitutes a duplicate claim. The applicable regulations provide with respect to duplicate claims that:

> In the case of a Claimant who files more than one claim for benefits under this part, the later claim shall be merged with the earlier claim for all purposes if the earlier claim is still pending. If the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the deputy commissioner determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of § 725.310 are met.

§ 725.309(d) (2000).

To assess whether a material change is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proved at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 B.L.R. 2-10 (6th Cir. 1994). The Board has ruled that the focus of the material change standard is on specific findings made against the miner in the prior claim; an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does not constitute an element of entitlement "previously adjudicated against a Claimant." *See Allen v. Mead Corp.*, 22 B.L.R. 1-63 (2000) (*en banc*). If a Claimant establishes the existence of an element previously adjudicated against him, he has established as a matter of law a material change in conditions, and is entitled to a full adjudication of his claim based on the record as a whole. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608, 22 B.L.R. 2-288 (6th Cir. 2001); *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997). Because this case arises within the Sixth Circuit, in order to meet the threshold requirement for a duplicate or subsequent claim, the newly submitted evidence must also differ qualitatively from the previously submitted evidence. *See Grundy Mining Co. v. Director, OWCP* [*Flynn*], 353 F.3d 467, 23 B.L.R. 2-44 (6th Cir. 2003); *Chaffin v. Peter Cave Coal Co.*, 22 B.L.R. 1-294 (2003).

The newly developed medical evidence in this case does not establish that Claimant has pneumoconiosis or a totally disabling pulmonary or respiratory impairment. The medical evidence generated subsequent to the denial of Claimant's previous claim does not persuasively establish a material change in conditions. Moreover, the newly submitted evidence does not differ qualitatively from that submitted previously as required by the Sixth Circuit.[6]

Pneumoconiosis

For purposes of the Act, pneumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 30 U.S.C. § 902(b); § 718.201. In order to establish entitlement to benefits under Part 718, the Claimant must establish that he has

[6] Even assuming that Claimant had established a material change in conditions, he has not established total respiratory disability on the basis of the evidentiary record as a whole, including the evidence from the prior two claims. (DD-28, 29). The x-ray evidence does not establish the presence of pneumoconiosis, given the negative x-ray rereadings by employer's experts. The diagnoses by Drs. Domm (bronchoscopy), Baker and Parrish of chronic pulmonary emphysema, industrial bronchitis, and pneumoconiosis, were all attributed to coal mine dust exposure. These opinions may be assumed to be evidence of coal workers' pneumoconiosis. *See Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). However, the uniformly nonqualifying clinical studies, and the reasoned assessments by Dr. Hippensteel, constitute credible and persuasive contrary probative evidence that effectively rebuts other proof of total respiratory disability as well as pneumoconiosis.

pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. §§ 718.1, 718.202, 718.203 and 718.204 (2004). *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987). *Jericol Mining*, *Inc. v. Napier*, 301 F.3d 703, 708, 22 B.L.R. 2-537 (6th Cir. 2002). The failure to prove any requisite element precludes a finding of entitlement. *Anderson v. Valley Camp of Utah*, *Inc*., 12 B.L.R. 1-111 (1989); *Perry v. Director*, *OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

Because this claim arises within the Sixth Circuit, Claimant may establish the existence of pneumoconiosis under any one of the alternate methods set forth at § 718.202(a). *See Furgerson v. Jericol Mining, Inc.*, 22 B.L.R. 1-216 (2002) (en banc). The existence of pneumoconiosis may be based upon x-ray evidence under § 718.202(a)(1); upon the basis of autopsy or biopsy evidence under § 718.202(a)(2.); by certain presumptions under § 718.202(a)(3), if applicable. In this case, the presumption under § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 does not apply to claims filed after January 1, 1982; § 718.306 applies only to survivors' claims filed prior to June 30, 1982. A miner may also establish the existence of pneumoconiosis under § 718.202(a)(4) on the basis of a reasoned medical opinion based upon objective medical evidence which supports a diagnosis of pneumoconiosis.

X-Ray Evidence

The record pertinent to the instant claim contains eleven interpretations of seven chest x-rays that were taken after the final denial of Claimant' previous claim. Dr. Spitz interpreted six films, taken between January 20, 1997, and December 1, 1998, as negative for pneumoconiosis. (Es-7 - 12). There are two positive readings of the x-ray taken on May 10, 1999. (D-11). This film has been reread as negative by Drs. Sargent, Wheeler and Scott. (Ds-12, 27). The interpretations by employer's experts prevail on the basis of their expertise and credentials. Greater weight is properly given to x-ray readings performed by B-readers over interpretations by physicians who possess no particular radiological qualifications. *See LaBelle Processing Company v. Swarrow*, 72 F.3d 308, 20 B.L.R. 2-76 (3d Cir. 1995). Greater weight may be given to the readings of physicians who are both B-readers and Board-certified radiologists. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985). *See Zeigler Coal Co. v. Director*, *OWCP* [*Hawker*], 326 F.3d 894, 899, __ B.L.R. 2-___ (7th Cir. 2003). A radiologist's academic teaching credentials in the field of radiology are relevant to the evaluation of the weight to be assigned to that expert's conclusions. *See Worhach v. Director*, *OWCP*, 17 B.L.R. 1-105 (1993). Neither Dr. Parrish nor Dr. Hughes are shown to possess expert radiological credentials. Employer's experts are all dually qualified as board-certified radiologists and B-readers. Consequently, Claimant has not established the presence of pneumoconiosis on the basis of x-ray evidence at § 718.202(a)(1).

Medical Opinion Evidence

Since there is no evidence relevant to biopsy or autopsy, the existence of pneumoconiosis is not established under § 718.202 (a)(2). None of the enumerated presumptions apply in this case under § 718.202(a)(3). Therefore, the medical opinion evidence determines whether the Claimant has established the presence of pneumoconiosis under that provision.

The sole medical opinion diagnosis of pneumoconiosis that was submitted by Claimant is that of Dr. Parrish. Dr. Parrish's diagnosis does not establish pneumoconiosis. First, Dr. Parrish relies on a chest x-ray that was reread by three better qualified readers as negative. *See Winters v. Director, OWCP*, 6 B.L.R. 1-877 (1984). While a medical opinion diagnosis of pneumoconiosis may be sufficient *notwithstanding* a negative x-ray, *see Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1996), where x-ray evidence constitutes a major part of the physician's documentation, his opinion may be given diminished probative weight if *that* film has been reread as negative. *Cf. Director, OWCP v. Rowe*, 710 F.2d 251, 255 n. 6, 5 B.L.R. 2-99 (6th Cir. 1983) (validity of opinion discounted because doctor relied on x-ray found to be unreadable).

Dr. Parrish also diagnosed industrial bronchitis. This disease, if attributable to Claimant's coal mine dust exposure, might qualify as coal workers' pneumoconiosis notwithstanding the negative x-rays of record. *See Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). In *Cornett v. Benham Coal Co.*, 227 F.3d 569, 575, 22 B.L.R. 2-107 (6th Cir. 2000), the court emphasized that the "legal" definition of pneumoconiosis "'encompasses a wider range of afflictions than does the more restrictive medical definition of pneumoconiosis.'" (quoting *Kline v. Director*, *OWCP*, 877 F.2d 1175, 1178, 12 B.L.R. 2-346 (3d Cir. 1989)). *See also Mitchell v. OWCP*, 25 F.3d 500, 507 n.12, 18 B.L.R. 2-257 (7th Cir 1994); *Eagle v. Armco Inc.*, 943 F.2d 509, 511 n.2, 15 B.L.R. 2-201 (4th Cir. 1991); *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 591 (7th Cir. 1985) (chronic obstructive pulmonary disease meets statutory definition whether or not technical pneumoconiosis). However, an obstructive pulmonary or respiratory impairment must be proved to have been significantly related to or substantially aggravated by Claimant's coal mine dust exposure. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 341, 20 B.L.R. 2-246 (4th Cir. 1996); *see generally* 65 Fed. Reg. 79943 (Dec. 20, 2000) (citing cases). The disease must also constitute a *chronic* pulmonary or respiratory disease. § 718.201.

On this record Dr. Parrish's diagnosis of pneumoconiosis is unpersuasive. His physical examination of Claimant detected no abnormalities in the lungs, although he did record Claimant's complaints of wheezing, shortness of breath, and dyspnea. A physical examination and history may qualify in an appropriate case as a reasoned medical opinion. *See Poole v. Freeman United Coal Mining Co*., 897 F.2d 888, 893, 13 B.L.R. 2-348 (7th Cir. 1990). *Gomola v. Manor Mining and Contracting Corp.*, 2 B.L.R. 1-130 (1979). The probative value of medical opinions depends upon "the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 B.L.R. 2-269 (4th Cir. 1997). *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 950-951, 21 B.L.R. 2-23 (4th Cir. 1997). On the other hand, Dr. Hippensteel, who reviewed the testing conducted by Dr. Parrish, explained in detail why the arterial blood gas and pulmonary function studies did not demonstrate either a restrictive or obstructive ventilatory impairment. Dr. Hippensteel's opinion persuasively contradicts Dr. Parrish's diagnosis. Moreover, Dr. Hippensteel's view that industrial bronchitis would have resolved relatively soon after Claimant left the mines is also persuasive, and is inconsistent with "legal" pneumoconiosis which must remain a chronic condition.

Dr. Parish's medical opinion that Claimant has pneumoconiosis, including any pulmonary or respiratory impairment significantly related to, or substantially aggravated by, Claimant' coal mine dust exposure, is not persuasive. In contrast, Dr. Hippensteel persuasively accounts for the effects of Claimant' many years of coal mine dust exposure in ruling out that exposure in the development of any pulmonary condition. *Cf. Peabody Coal Co. v. Hill*, 123 F.3d 412, 417, 21 B.L.R. 2-192 (6th Cir. 1997) (37 years of coal mine employment). Therefore, the medical opinion diagnosis of pneumoconiosis does not establish the existence of that disease pursuant to § 718.202(a)(4). Moreover, in this Sixth Circuit duplicate claim, the evidence of pneumoconiosis does not differ qualitatively from the previously submitted evidence.

Total Respiratory Disability

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), §§ 718.204(b) and (c) (2000). Any loss in lung function may qualify as a total respiratory disability under § 718.204(c) (2000). *See Carson v. Westmoreland Coal Co.*, 19 B.L.R. 1-16 (1964), *modified on recon*. 20 B.L.R. 1-64 (1996).

The applicable regulations provide for proof of total disability, other than by the presence of complicated pneumoconiosis, by: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinion based upon appropriate diagnostic techniques; and (5) in certain circumstances, lay testimony. §§ 718.204(c)(2000); s*ee Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999). A finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony, however. *See Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994). There is no evidence in the record that Claimant suffers from complicated pneumoconiosis or cor pulmonale. Moreover, Claimant has not demonstrated total respiratory disability pursuant to §§ 718.204(c)(1) or (2) (2000). None of the ventilatory or arterial blood gas tests produced results that qualify under the regulations.

The medical opinion evidence does not prove total respiratory disability pursuant to § 718.204(c)(4). Dr. Parrish's assessment of Claimant's reversible airways disease, although it requires "chronic" medication, does not persuasively prove that Claimant is precluded from returning to the mines from a pulmonary or respiratory standpoint. A pulmonary disease that necessitates medication which permits a person to function may be disabling. However, Dr. Parrish's assessment has reduced probative value because of his negative findings on physical examination that explicitly identified no abnormalities of the chest or extremities. Although Dr. Hippensteel did not examine Claimant, his detailed review of medical records, and his conclusions based thereon, undermine the probative weight of Dr. Parrish's opinion.

In addition, the objective clinical studies administered by Dr. Parrish did not produce qualifying values. Although a medical opinion of total disability does not require qualifying values from the physician's clinical testing, the results of such testing form a significant part of the basis of the clinical documentation for his or her opinions. *See Clark v. Karst-Robbins*

Corp., 12 B.L.R. 1-149 (1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985). *See generally Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 B.L.R. 2-99 (6th Cir. 1983). Claimant's testimony, provides significant perspective for the medical opinion disability assessments regarding the nature of his usual coal mine work. *See generally Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1988). The detailed description of Claimant's last coal mine work as an electrician and foreman from March, 1980 until January, 1995, jobs in which he was required to perform heavy lifting, is also significant. (D-29:3).

Review is required of all relevant evidence, like and unlike, to determine whether a Claimant has established total respiratory disability. *See Shedlock v. Bethlehem Mines Corporation*, 9 B.L.R. 1-195 (1986), *aff'd on recon. en banc*, 9 B.L.R. 1-236 (1987). In the absence of contrary probative evidence, evidence which meets one of the § 718.204(c) standards would establish Claimant's total disability. *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Such a review establishes that the nonqualifying clinical studies, as well as Dr. Hippensteel's critique, constitute contrary probative evidence that outweighs Dr. Parrish's disability assessment to the extent that it might imply total disability attributable to pneumoconiosis. Claimant, therefore, has not established total respiratory disability.

All relevant evidence submitted with this duplicate claim does not establish that Claimant now suffers from pneumoconiosis or a total respiratory disability. Even if the newly submitted evidence were probative of either pneumoconiosis or total respiratory disability, it does not *differ qualitatively* from the previously submitted evidence. This standard for duplicate and subsequent claims in the Sixth Circuit requires that this duplicate claim be denied on the basis of the previous denial of benefits. § 725.309(d). As the court pointed out in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608, 22 B.L.R. 2-288 (6th Cir. 2001):

> [Employer] argues that, in addition to the above requirements, the new medical evidence must be compared with the preexisting medical evidence on the same issue. It claims that the ALJ and the Board failed to do this with regard to the 1992 evidence on total disability, and if they had done so, they would have discovered that 1988 pulmonary measures also showed "total disability." Thus, on this issue, TCC asserts, there was no "change in condition" and res judicata cannot be avoided on the ground actually used by the ALJ and the Board.
>
> As the employer correctly points out, if the ALJ need only assess whether the new medical evidence proved an element previously held to have been missing, it would allow the relitigation of cases in which the new and old medical evidence were essentially the same, but in which there had been a legal error in the previous adjudication. In *Sharondale,* we held such situations were correctable within the one-year time period after a denial, but that after this point, a claimant is not "entitled to benefits simply because his claim should have been granted." 42 F.3d at 998. In order to maintain this limitation in favor of finality, and in order to measure a "*change* in conditions" the ALJ must compare the sum of the new evidence with the sum of the earlier evidence on which the denial of the claim had been premised. A "material change" exists only if the new evidence both establishes the element *and* is substantially more supportive of claimant. *See id.* at 999 (despite ALJ finding that "new x-ray evidence established the existence of pneumoconiosis," remanding for an ALJ determination of "how the later x-rays differ qualitatively from those submitted in 1985").

Kirk, 264 F.3d at 609 (footnote omitted). The newly submitted evidence does not meet this standard.

Conclusion

Claimant has not proved a material change in conditions, and on the record as a whole, Claimant has not established the existence of pneumoconiosis or a total respiratory disability. In light of these conclusions, it is not necessary to decide the issues relating to the designation of the responsible operator liable for any benefits at this time.

ORDER

The claim of Oscar R. Phillips for benefits under the Act is denied.[7]

A
EDWARD TERHUNE MILLER
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this Decision by filing a Notice of Appeal with the **Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.

[7] The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to benefits. Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim